Media General Operations, Inc., d/b/a Richmond Times-Dispatch and Graphic Communications International Union, Local 40-N, AFL–CIO. Case 5–CA–29907

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 4, 2002, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel and the Charging Party each filed exceptions, a supporting brief, and an answering brief. The Respondent filed cross-exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt the recommended Order.

I. INTRODUCTION

The issues presented in this case are whether the judge correctly found that the Respondent did not violate Section 8(a)(5) of the Act by unilaterally terminating an annual Christmas/holiday bonus and by refusing the Union's requests for financial information relating to the proposed termination. Contrary to our dissenting colleague, we find the judge's findings are well supported by the facts of this case and by Board precedent.

II. FACTS

On July 31, 2001,[1] Frank McDonald (vice president of human resources) and Karen Larsen (director of human resources) notified Valerie Irvin (the Union's president) by teleconference call that the Christmas bonus—which the Respondent has paid to employees, including those in the pressroom unit represented by the Union, since 1960—would not be paid to any employees in 2001 because of poor economic conditions. McDonald and Larsen also informed Irvin of other cost-saving measures the Respondent was instituting. During that call, McDonald acknowledged the bonus cancellation was a bargainable issue, and that the Respondent was willing to negotiate with the Union. Irvin informed McDonald that she would get back to him after checking with her constituents.

[1] All dates are in 2001, unless otherwise noted.

On the same day as that telephone call, the Respondent's chief executive officer, J. Stewart Bryan, sent a letter to all employees regarding the bonus cancellation. The letter read as follows:

> Dear Fellow Employees:
>
> As we all well know, we are in the midst of the worst advertising downturn in a decade, caused by a weak economy. This is having a devastating effect on the financial performance of all media companies. In response to weak business conditions, the companies in our industry are implementing aggressive cost-cutting measures in order to maintain cash flow during this difficult time. Many have had significant employee layoffs.
>
> Thus far, this has not been the case at Media General, and we hope to continue to avoid a major layoff. We must, however, find other ways to reduce costs further.
>
> Unfortunately, the revenue outlook for the rest of this year is bleak. Opinion in our industry is divided on whether the advertising downturn is at bottom, but there certainly is no evidence of an upturn. Our company faces a very difficult second half of the year. The broadcast division will not have the revenues it had last year from political campaigns and the Olympics, and our newspaper side is also weak. In the absence of new revenue possibilities, we are driven to look at the cost side of the business to improve overall performance.
>
> We have already instituted strict hiring constraints and reduced overtime. We have restricted travel and entertainment and the use of outside consultants. We have eliminated many marketing and promotion expenditures. Capital expenditures have been restricted to those that produce quick positive cash impact.
>
> Many of the initiatives focused on the cost side of the business have been in place for several months. These initiatives have been helpful in addressing the business requirement to maintain a strong cash flow. However, as we look to the remaining part of the year we find that our current initiatives will not be enough to offset the projected decline in advertising revenues. As a result of the poor economic climate, we are unable to pay a Christmas or Holiday bonus this year to employees who may have been eligible for one. We will also implement a new Voluntary Unpaid Leave Policy for non-represented employees, and your Human Resources Department will announce the details shortly.

> Our entire management team very much regrets having to take these actions, but we have no choice based on the business environment. While this may appear drastic within the culture of our company, it is far less severe than measures already taken by many of our peer companies.
>
> I know each one of you is working hard and trying to help the company all you can during this difficult time. I appreciate and thank you for your support and dedication and ask you to keep up the good work so that we may emerge from this difficult period with the strength and resiliency we need to deal well with our very bright future.
>
> Yours Sincerely,
> /s/ Stewart Bryan

The Union responded by letter on August 3 that it was willing to bargain, but the Union made it clear that it needed some financial information to verify that the Respondent's revenues were weak before meeting with the Respondent. On August 8, the Respondent informed the Union that it would not provide the requested information and clarified that it was not unable to pay the bonus, but that it chose not to pay it due to the economic conditions in the market. The Respondent reiterated that it was willing to bargain. The Union did not contact the Respondent about bargaining.[2]

III. THE JUDGE'S DECISION

The judge found the Respondent did not violate Section 8(a)(5) by refusing to provide requested financial information, nor did the Respondent violate Section 8(a)(5) by unilaterally discontinuing the bonus. Relying on *Nielsen Lithographing*, 305 NLRB 697 (1991), affd. sub nom., *Graphic Communications Workers Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992), the judge recognized that the Respondent would have incurred a duty to provide requested financial information if it asserted an inability to pay, but not if the Respondent only claimed economic difficulties or business losses.

Acknowledging that CEO Bryan's July 31 letter included the phrase "unable to pay," the judge concluded that the phrase had to be considered in context and found it did not express an inability to pay. Rather, the judge found the letter as a whole conveyed that the Respondent was losing money, not that it had insufficient assets to pay the bonus. Relying on *Central Management Co.*, 314 NLRB 763, 768–769 (1994), the judge further held that, even assuming the initial letter claimed an inability to pay, the Respondent subsequently made it clear in its August 8 letter that it had not been and was not asserting such a claim. Thus, the judge held the Respondent did not violate Section 8(a)(5) by refusing to provide the requested information. Likewise, the judge held the Respondent did not violate the Act when it discontinued the bonus after notifying the Charging Party and expressing its willingness to bargain because the Charging Party "sat on its rights" by conditioning bargaining on receiving the information. See *Haddon Craftsmen*, 300 NLRB 789 (1990), affd. sub nom., *Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991) (table).

IV. THE EXCEPTIONS AND DISSENT

The General Counsel, Union, and our dissenting colleague make three principal arguments against the judge's decision. With respect to the Respondent's refusal to provide requested financial information, they argue that the judge erred in failing to find the Respondent's letter claimed a present inability to pay the bonus. They also contest the judge's conclusion that the Respondent's August 8 letter made clear that it had not and was not claiming a present inability to pay. Finally, irrespective of the Respondent's alleged obligation to provide the requested financial information, they assert that the judge erred in failing to find that the Respondent's cancellation of the 2001 bonus was announced as a fait accompli and did not allow for meaningful decision bargaining.

V. ANALYSIS

We agree with the judge's conclusion that the Respondent did not violate Section 8(a)(5) by refusing to provide the financial information requested by the Union[3] or

[2] On October 5, the Respondent sent another letter to all employees, announcing the bonus would not be paid in 2001 nor in future years, although employees who had been receiving the bonus would have its value added to their paychecks throughout 2002; the Respondent also invited represented employees to participate in the Respondent's proposal to include the value of the bonus in their paychecks through 2002. That same day, McDonald and Larsen called Irvin to discuss the letter, and McDonald again acknowledged that the bonus issue was a negotiable item. As on July 31, Irvin told McDonald she would speak to him after consulting her constituents; Irvin did not contact McDonald thereafter. However, on December 21, McDonald called Irvin to inform her that unit employees could have the value of the bonus check added to their paychecks through the upcoming year; McDonald also offered to negotiate with the Charging Party regarding the matter. Irvin again informed McDonald that she would get in touch with him, but again, she did not do so.

[3] We find it unnecessary to rely on the judge's finding at fn. 7 of his decision that the Union knew or should have known the Respondent was not claiming a present inability to pay because the Union had been given the Respondent's annual and 10-K reports for 1998-2000, showing the Respondent had sufficient assets to pay the Christmas bonus, and because the Union, as a stockholder in the Respondent, was aware the Respondent declared a quarterly dividend.

by unilaterally implementing its cancellation of the holiday bonus.

A. The Information Request

The Supreme Court held in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), that a union is entitled to examine an employer's financial records when that employer bases its bargaining position on an asserted inability to pay. Since the *Nielsen Lithographing* decision in 1991, the Board's application of this holding has emphasized "a distinction between asserting an inability to pay, which triggers the duty to disclose, and asserting a mere unwillingness to pay, which does not." *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 960–961 (D.C. Cir. 2003), denying enf., *Lakeland Bus Lines*, 335 NLRB 322 (2001).[4]

The Board recently applied this distinction in *AMF Trucking & Warehousing*, 342 NLRB No. 116 (2004). Responding to proposals made during bargaining sessions, the employer stated it had purchased the company 'in distress a year and a half earlier, and that the company was still in distress," ''fighting to [stay] alive," and 'weaker this year" than in previous years. Id. slip op. at 1. The employer reiterated these statements at a later bargaining session. However, the employer refused the union's subsequent request of access to the employer's financial records and denied that it claimed an inability to pay. Id. slip op. at 1. The Board began its analysis by stating:

> [T]he phrase "inability to pay" means, by definition, that the employer is incapable of meeting the union's demands. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business.

Id., slip op. at 2. The Board found that the employer's statements did not establish a present "inability to pay" claim, emphasizing that the employer never stated that its survival was at stake or that it would have no future if it acceded to the union's demands. . . . The Board stressed that a statement that an employer was in distress "is not synonymous with an assertion that the [employer] currently has, or will have, insufficient assets to pay," and concluded in that case there were "no such bleak predictions about going out of business." Id.[5]

Similarly, there were no such bleak predictions or pronouncements in the Respondent's July 31 letter. The letter began by detailing an industrywide downturn caused by a weak economy and describing the industrywide reactions, such as cost-cutting measures and layoffs (which the Respondent noted it had not done). The letter mentions the savings initiatives the Respondent had already enacted to improve its overall performance—and that the initiatives had been "helpful" to a point. Notably, the letter does not say that the initiatives were necessary because the Respondent had insufficient assets to pay the bonus, or that the Respondent would not survive were it to do so. While the letter includes the words "unable to pay," that phrase, when taken in context, describes the bonus cancellation as an effort designed "to maintain a strong cash flow" and "to offset the projected decline in advertising revenues," not as a measure upon which the Respondent's survival was based.

Our dissenting colleague does not read the letter in its proper context. Instead, the dissent takes certain phrases and focuses on them in isolation from the text in which they appear to extrapolate a present "inability to pay" claim.[6] This is the same artificial reading of language the administrative law judge properly rejected when he said, "[the letter] must be considered together and in context . . . its content reflects and conveys to employees that the Respondent was losing money. However, there is a clear distinction between 'losing money' and 'an inability to pay.''' We agree with this analysis.

Shell Co., 313 NLRB 133 (1993), cited by the dissent, is a factually distinct case. In *Shell Co.*, the employer informed the union that "economic conditions had affected them 'very badly, very seriously,' that present circumstances . . . were 'bad' and a matter of "survival," and that it needed the union's help because of its condition. Id. at 133. The Board found the employer claimed a present inability to pay because the employer's posture was grounded in assertions that it could not survive if it

[4] Our colleague says that *Nielsen* has been much-criticized. In response, we note that *Nielsen* was affirmed by the Seventh Circuit, and no party here seeks to overrule it. We believe that our colleague's position is a reasonable one, but that our position is more reasonable and well within the bounds of the Act.

[5] The dissent maintains that our reliance on *AMF* is unsound because the employer in *AMF* never expressly said it was unable to pay, so the Board was interpreting the employer's representations to decide if they implied such a claim. Although the dissent insists we are extending *AMF* to include cases where the employer expressly claims an inability to pay, the Board has consistently held there are no "magic words" that convey an inability to pay, but instead the Board examines statements in their overall context. See *Burruss Transfer, Inc.*, 307 NLRB 226, 228 (1992) (finding the employer had not claimed an inability to pay).

[6] We note that the Union specifically referred to two phrases in the July 31 letter in support of its August 3 request for financial information. Neither of these phrases is among the three cited by the dissent as the basis for interpreting the letter as stating a claim of inability to pay.

continued meeting its obligations under its most recent collective-bargaining agreement with the union. Id. at 133–134. In contrast, the Respondent never even suggested that its existence was at stake, let alone said that cancellation of the bonus was a "matter of survival." Instead of presenting a clear claim of insufficient assets, as our dissenting colleague argues, the Respondent's letter depicts an industry-wide revenue down-cycle and the measures enacted in response. Finally, the letter closed with a reference to the Respondent's "very bright future," hardly an indication that the Respondent's demise was imminent.

Assuming for the sake of argument only that the July 31 letter made out a present "inability to pay" claim, the Respondent's August 8 letter made it clear that the Respondent was not asserting such an inability to pay. The Board recently dealt with a similar issue in *American Polystyrene Corp.*, 341 NLRB No. 67 (2004). There, the statements alleged to amount to an "inability to pay" claim were made by the employer's general manager and chief negotiator, Carolyn Tan, during a bargaining session for a successor agreement. Id. slip op. at 1. The union's chief negotiator asked Tan if ''things were really that bad." Id. Tan replied that things were "tough." The negotiator then asked if Tan "was saying that she could not afford the union's proposal." Id. Tan replied, "No, I can't. I'd go broke." Id. At the end of that day's bargaining session, the union's negotiator gave Tan a letter claiming the employer said it could not afford the union's proposal and requesting review of the employer's books. Tan responded by letter the next day, rejecting the request: "While I have told you that we are a small company and times are tough, at no time have I ever told you we cannot afford your proposals. Rather, in these uncertain economic times, we believe that we need to take a more cautious approach than what you propose." Id. There was a similar exchange of letters 2 weeks later. The Board found that, even assuming the employer initially claimed a present inability to pay, the employer "effectively retracted any such claim simultaneously with its denial of the Union's request." Id. at slip op. 2.

The Respondent's letter denying it was claiming an inability to pay is nearly identical to the letter in *American Polystyrene*. As in *American Polystyrene*, the Respondent, upon receiving the information request, responded by denying it had made an "inability to pay" claim and explaining the reasons for its statements. Contrary to our dissenting colleague, we find the difference in the amount of time that elapsed between the alleged "inability to pay" claim and the purported retraction in this case does not warrant a different result from *American Polystyrene*. The Respondent's retraction letter was sent 8 days after its initial letter, and 5 days after the Charging Party's request for financial information. Furthermore, the retraction preceded any negotiations about the cancellation of the bonus, thus making clear from the start of the intended bargaining process (which the Union declined to participate in) the true meaning of the Respondent's financial claims in support of the proposed bonus cancellation.

The dissent also attempts to distinguish *Central Management*, upon which the judge relied, based on the fact that the union admitted the employer was not claiming an inability to pay. 314 NLRB at 769. In that case, the employer said during its second bargaining session that it "was losing money and could not afford to pay what they were paying." Id. at 764. In response and during the next session, the union asked to examine the employer's financial records; the records were never produced, however. Id. at 764. Instead, during the fourth bargaining session, the employer handed the union a statement which said it did not claim a present inability to pay. Id. at 765. At the fifth bargaining session, the union's chief negotiator asked the employer why it was still insisting on a proposal "when it no longer claimed inability to pay." Id. at 765. The Board found the employer made an "inability to pay" claim during the second and third bargaining sessions, obligating the employer to provide the union with its financial records. Id. at 769. It concluded, however, the employer effectively retracted that claim during the fourth bargaining session. Id. at 769. Although the Board pointed to the union's admission during the fifth bargaining session that the employer no longer claimed inability to pay as evidence that the employer effectively retracted its claim, the absence of such an admission cannot hardly be relied upon to defeat an effective retraction.

Thus, the dissent has not pointed to a meaningful distinction between the facts of this case and the facts of *American Polystyrene*[7] and *Central Management*. It appears that our colleague believes that an employer cannot effectively retract a purported claim of inability to pay unless it expressly admits to having made such a claim. We reject that view. It may well be that an employer cannot make a clear claim of inability to pay and then say "disingenuously or in bad faith" that it never made such a claim. See *Lakeland Bus Lines v. NLRB*,

[7] Consistent with our footnote from *American Polystyrene*, 341 NLRB slip op. at 2 fn. 7, Chairman Battista and Member Schaumber find that it is unnecessary to pass in this case on the validity of the Board's decision in *Lakeland Bus Lines*. As noted, that decision was reversed on appeal. Further, although the dissent argues *Lakeland Bus Lines* is directly on point, we find the present case more akin to *American Polystyrene*.

347 F.3d 955, 964. However, the Respondent here made a claim that, at worst, could be interpreted as claim of inability to pay and then clarified that this was not its claim.

For the reasons discussed above, we agree with the judge that the Respondent had no duty to provide the requested financial information. We therefore adopt his recommendation to dismiss the complaint allegation of an 8(a)(5) violation.

B. Respondent's Obligation to Bargain About the Bonus Cancellation

We also reject the assertion that the Respondent unlawfully failed to bargain over the decision to cancel the Christmas bonus because the change was presented to the Union as a fait accompli. The Respondent made its announcement several months before the change would be implemented, and it told the Union that it was willing to bargain over the change. Contrary to the dissent, we do not find that CEO Bryan's July 31 letter conveyed the finality of a bonus cancellation decision as to bargaining unit employees. It must be remembered that this letter was sent to all of the Respondent's employees. The cancellation decision was final, or at least nonnegotiable, as to unrepresented employees. However, McDonald and Larsen notified the Union of the proposed change in advance of Bryan's letter and acknowledged that the bonus cancellation was a bargainable issue. Nothing in the Bryan letter can reasonably be construed as negating this prior communication. Indeed, the Union did not treat it as such in its August 3 letter, which expressed the availability of union representatives to meet in response to McDonald and Larsen's statement that the cancellation "was a bargaining issue."

The dissent cites a portion of McDonald's testimony as post hoc evidence that Respondent never intended to bargain about the cancellation decision, only about its effects. There is no evidence that any of the Respondent's officials suggested they would not bargain over the decision to cancel the bonus when they expressed to the Union their willingness to bargain about the bonus cancellation in the summer of 2001.[8] Under the circumstances, it was incumbent on the Union to test the Respondent's intent to bargain about the cancellation decision by engaging in negotiations. Instead, the Union chose to request financial information, which we have found Respondent was not legally required to provide, and the Union would not negotiate without it.

Based on the foregoing, we find the General Counsel failed to prove that the Union was presented with a fait accompli. See *Haddon Craftsmen*, supra at 790–791 (finding evidence insufficient to establish fait accompli in light of lack of objective evidence indicating that bargaining was futile).

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 26, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Since 1960, the Respondent had paid its employees an annual bonus. It cancelled the bonus unilaterally in 2001. In a letter to employees announcing this decision as a fait accompli, the Respondent claimed that it was "unable to pay" the bonus and had "no choice" but to cancel it. When the Union asked for financial information substantiating this inability-to-pay claim, the Respondent refused to supply it, denied it had said it was unable to pay the bonus, and claimed it had said it had chosen not to pay it. On these facts, the judge and the majority dismiss the complaint in its entirety.

I would find the violations as alleged. The Respondent violated Section 8(a)(5) by unilaterally cancelling the bonus. Contrary to the judge's finding, the Union did not waive its right to bargain by conditioning bargaining on receipt of financial information. The Respondent never gave the Union an opportunity to bargain about the bonus cancellation, so it violated the Act whether or not the Union was entitled to the requested information. In any

[8] The dissent argues we are erroneously reading the Respondent's letter, contending that there was contemporaneous evidence that the Respondent would not bargain over the decision to cancel the bonus. However, the dissent ignores the fact that the Respondent acknowledged the decision was a bargainable issue, as well as the fact that the Union treated that acknowledgement as such, and that there was no contemporaneous evidence that either party suggested that bargaining would be circumscribed to only the effects of the cancellation. Similarly, the dissent is mistaken that there is only one interpretation for the Respondent's statements—that the Respondent was only willing to engage in effects bargaining. There is, of course, another interpretation—that it was consistent for the Respondent to acknowledge to the Union that it had a bargaining obligation over the cancellation decision at the same time the Respondent informed the Union about the letter that was sent to all of the Respondent's employees. We find, consistent with our finding that the General Counsel failed to prove that the Union was presented with a fait accompli, that this interpretation has a stronger basis in the record evidence.

case, the Union was entitled to the information, and the Respondent violated Section 8(a)(5) by refusing to furnish it. The Respondent expressly claimed inability to pay, and it did not retract that claim. Remarkably, the majority concludes that "unable to pay" does not mean "unable to pay," and "no choice" but to cancel the bonus means "has chosen to cancel" it. If *Nielsen*[1]—a much-criticized decision—leads to this result, then it should be overruled. But in fact, as explained below, under *Nielsen* the Respondent's violation is clear.

I. FACTS

Frank McDonald, Jr. is the Respondent's vice president of human resources; Karen Larsen is its director of human resources; and J. Stewart Bryan, III is its chairman and chief executive officer. Graphic Communications International Union, Local 40-N, AFL–CIO (Local 40-N or the Union) represents a bargaining unit consisting of the Respondent's pressroom employees. The president of Local 40-N is Valerie Irvin.

The Respondent's past practice, dating back to 1960, was to pay its employees an annual Christmas / Holiday bonus equal to 1 week's pay, typically in the second week of December. On July 31, 2001,[2] McDonald and Larsen telephoned Irvin to tell her that the 2001 bonus would not be paid to unit employees. McDonald informed Irvin that all employees would be receiving a letter from CEO Bryan explaining why the bonus was being cancelled. After reviewing with Irvin the contents of Bryan's letter, McDonald told Irvin he recognized that the cancellation of the bonus was "a bargainable issue." McDonald did not mean, however, that the cancellation *decision* was bargainable. Rather, he testified that he placed the call to Irvin to "give her the opportunity to . . . bargain[ ] over the effects" of that decision. (Tr. 116.)

Bryan's letter to employees announcing the bonus cancellation was dated July 31, the same day McDonald phoned Irvin, and stated in pertinent part as follows:

> As we all well know, we are in the midst of the worst advertising downturn in a decade, caused by a weak economy. This is having a devastating effect on the financial performance of all media companies. In response to weak business conditions, the companies in our industry are implementing aggressive cost-cutting measures in order to maintain cash flow during this difficult time. Many have had significant employee layoffs.
>
> Thus far, this has not been the case at Media General, and we hope to continue to avoid a major layoff. We must, however, find other ways to reduce costs further.
>
> Unfortunately, the revenue outlook for the rest of this year is bleak. Opinion in our industry is divided on whether the advertising downturn is at bottom, but there certainly is no evidence of an upturn. Our company faces a very difficult second half of the year. The broadcast division will not have the revenues it had last year from political campaigns and the Olympics, and our newspaper side is also weak. In the absence of new revenue possibilities, we are driven to look at the cost side of the business to improve overall performance.
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> We have already instituted strict hiring constraints and reduced overtime. We have restricted travel and entertainment and the use of outside consultants. We have eliminated many marketing and promotion expenditures. Capital expenditures have been restricted to those that produce quick positive cash impact.
>
> Many of the initiatives focused on the cost side of the business have been in place for several months. These initiatives have been helpful in addressing the business requirement to maintain a strong cash flow. However, as we look to the remaining part of the year we find that our current initiatives will not be enough to offset the projected decline in advertising revenues. As a result of the poor economic climate, *we are unable to pay a Christmas or Holiday bonus this year* to employees who may have been eligible for one. We will also implement a new Voluntary Unpaid Leave Policy for nonrepresented employees, and your Human Resources Department will announce the details shortly.
>
> *Our entire management team very much regrets having to take these actions, but we have no choice based on the business environment*. (Emphasis added.)

By letter dated August 3, the Union requested certain items of financial information necessary to assess the claims made in Bryan's letter. The August 3 letter communicated the Union's desire to bargain over the bonus issue once it had examined the requested information. The Respondent denied the information request on August 8 with this explanation:

> Your request for this financial information is apparently based on your belief that Media General is financially unable to pay the Christmas bonuses. However, Media General has not indicated that it is unable to pay the

[1] *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), petition for review denied sub nom. *Graphic Communications Intl. Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

[2] All dates are 2001 unless otherwise indicated.

bonuses from a financial standpoint but rather that it has chosen not to pay at this time due to the economic situation in the marketplace.

II. ANALYSIS

A.. The Respondent's Cancellation of the 2001 Bonus Violated Section 8(a)(5)

A union cannot be held to have waived bargaining over a change that is presented to it as a fait accompli. See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Yet that is what the majority does, and that is how the Respondent presented the bonus cancellation to the Union. Although McDonald told Irvin on July 31 that the bonus cancellation was a "bargainable issue," the judge found (and there were no exceptions to the finding) that McDonald and Larsen also told Irvin, in the same July 31 conversation, that the 2001 bonus *would not be paid* to members of the bargaining unit. Bryan's July 31 letter promptly reiterated that message by informing all employees, including unit employees, that the bonus would not be paid. Only one interpretation of McDonald's statement that the cancellation was "bargainable" harmonizes that statement with the other two, and McDonald confirmed that interpretation when he admitted—in response to friendly questioning on direct examination—that he contacted Irvin to give the Union an opportunity to bargain over the *effects* of the cancellation. Concededly, some months remained before the implementation of the cancellation decision. However, where implementation is not imminent, an employer's announcement of a change concerning a mandatory subject of bargaining is still nothing more than notice of a fait accompli if the employer has no intention of changing its mind. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). That was the case here. By telling Irvin that the 2001 bonus would not be paid to unit employees, and by announcing to employees that it was "unable" to pay the bonus and had "no choice" but to cancel it, the Respondent clearly communicated that it had made up its mind with finality. McDonald's admission that the Respondent was willing to engage only in effects bargaining concerning the cancellation confirmed the finality of that decision.

The judge dismissed the allegation that the bonus was unilaterally changed without notice to or bargaining with the Union, erroneously linking it to whether the Respondent had incurred a duty to furnish requested financial information. Finding that the Respondent did not incur that duty (because it did not claim inability to pay the bonus), the judge reasoned that the Union waived bargaining by conditioning its willingness to bargain on receipt of information to which, in the judge's view (embraced by the majority), it was not entitled. As explained below, the judge's and my colleagues' predicate finding is wrong: the Union *was* entitled to the financial information it asked for, and therefore the Union did not waive bargaining. However, even assuming the Union was not entitled to that information, the unilateral cancellation of the bonus was still unlawful. The Respondent had already decided to cancel the bonus by the time it gave notice to the Union, and it communicated the finality of its decision both when it gave that notice and when it announced the cancellation to employees later the same day. The Respondent consigned the Union to bargaining merely over the effects of that decision. Thus, the only bargaining the Union could possibly have waived by refusing to negotiate without the requested information was effects bargaining, not decisional bargaining. Accordingly, the Respondent's unilateral decision to cancel the bonus violated Section 8(a)(5) *regardless* of whether its subsequent refusal to furnish financial information was also unlawful.

In finding, erroneously, that the Respondent's unilateral change did not violate Section 8(a)(5), the judge and the majority cite *Haddon Craftsmen*.[3] *Haddon Craftsmen* is distinguishable. In that case, the union received notice of an impending change at least 5, and possibly as many as 11, days before the employer announced the change to employees. The union did not request bargaining because it believed that the employer had already made up its mind about the change. As it turned out, the union was right: the employer's plant manager testified that he had already decided on the change before the union was ever notified. However, that fact had not been communicated to the union. Under those circumstances, the Board found no fait accompli in the absence of objective evidence that a request for bargaining would have been futile. 300 NLRB at 790 & fn. 8.

Here, by contrast, the Respondent did furnish objective evidence that a request to bargain over the cancellation of the bonus would have been futile. McDonald told Irvin that the bonus would not be paid to unit employees. Bryan's letter announced the cancellation of the bonus to all employees, including unit employees. McDonald's additional statement that the bonus cancellation was "bargainable" did not negate this objective evidence that a request to bargain over the decision would have been futile. In context, that statement could only have meant that the Respondent was willing to engage in effects bargaining. Otherwise, McDonald would have been contra-

[3] 300 NLRB 789 (1990), review denied mem. sub nom. *Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991).

dicting himself saying first that the bonus *would not* be paid and then, practically in the next breath, saying that the issue was "bargainable." At the hearing, McDonald confirmed that effects bargaining was all he meant.

The majority erroneously reads Bryan's July 31 letter as communicating that the cancellation decision was final only as to unrepresented employees. Nothing in the letter itself, which was addressed to all employees, suggested that the decision was final only as to some of them; and my colleagues do not contend otherwise. Rather, they derive their interpretation of Bryan's letter from McDonald's prior statement that the cancellation was bargainable, together with a purported absence of evidence of any contemporaneous statement suggesting that the Respondent would not bargain over the cancellation. But, as explained, there is such contemporaneous evidence: McDonald's statement that the bonus *would not be paid* to unit employees. Read in light of that statement, Bryan's letter means just what it says.

In finding no fait accompli, the majority relies in part on the fact that the Union's August 3 letter expressed a willingness to meet in response to McDonald's statement that the cancellation was bargainable. In context, however, McDonald's statement was equivocal at best. Because McDonald did not clearly express a willingness to bargain over the bonus decision (as opposed to its effects), the Union's willingness to meet cannot preclude a finding that the decision was presented as a fait accompli (which indeed, it was).

B. The Respondent's Refusal to Furnish Requested Financial Information Violated Section 8(a)(5)

The Board's test for determining whether an employer has incurred an obligation to furnish requested financial information is set forth in *Nielsen Lithographing Co.*, 305 NLRB 697 (1991).[4] Under *Nielsen*, that obligation arises when an employer claims it is presently unable to meet the union's current bargaining demands or will become unable to meet them during the life of the contract under negotiation. 305 NLRB at 700. Here, the Respondent supported its cancellation of the 2001 bonus by expressly stating that it was "unable to pay" the bonus and had "no choice" but to cancel it. And yet, the judge and the majority find that under *Nielsen*, the Respondent did not claim inability to pay. That the majority, applying *Nielsen*, can reach that result suggests a flaw in *Nielsen* itself.[5] Nevertheless, even under *Nielsen* the violation is clear here.

A. The Respondent Claimed Inability to Pay

In determining whether an employer has incurred a duty to open its books, the Board examines whether the employer's communication, reasonably interpreted, communicates "financial inability to meet the employ-

[4] *Nielsen Lithographing Co.*, 279 NLRB 877 (1986), enf. denied and remanded 854 F.2d 1063 (7th Cir. 1988), on remand 305 NLRB 697 (1991), petition for review denied sub nom. *Graphic Communications Intl. Union, Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

[5] This is far from the first case in which the *Nielsen* rule has revealed its flaws. In previous cases, it has given rise to opposite conclusions on facts that cannot be persuasively distinguished. For example, in *Burruss Transfer*, 307 NLRB 226 (1992), the Board found that the employer did *not* claim inability to pay where it said it would "not be able to survive" if it increased wages or benefits. The following year, in *Shell Co.*, 313 NLRB 133 (1993), the Board found that the employer *did* claim inability to pay where it characterized its financial situation as "a matter of survival." But then, in *AMF Trucking & Warehousing*, 342 NLRB No. 116 (2004), the Board found no inability-to-pay claim where the employer said it was "fighting to keep the business alive." These results cannot be squared. In addition, under *Nielsen* the Board has declined to find an inability-to-pay claim on stronger facts for such a finding than those in another case where an inability-to-pay claim *has* been found. For example, in *Lakeland Bus Lines*, 335 NLRB 322 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003), the employer told its employees that acceptance of its offer would enable it to "retain your jobs and get back in the black in the short term," and that the "future of Lakeland depends on it." Interpreting those statements as equivalent to the claim that "circumstances were bad and a matter of survival," the Board found a claim of inability to pay. 335 NLRB at 324–325. By contrast, in *AMF Trucking & Warehousing*, supra, no such act of interpretation was needed because the employer asserted outright that it was "in distress" and "fighting to keep the business alive." And yet, despite these more compelling facts, the Board in *AMF* found *no* inability-to-pay claim.

The majority characterizes the Board's post-*Nielsen* precedent as applications of the Supreme Court's decision in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), and observes that *Nielsen* was "affirmed" by the Seventh Circuit. However, that court made plain that the Board's pre-*Nielsen* doctrine, under which an employer's claim of competitive disadvantage sufficed to trigger the duty to furnish requested financial information, was "within the analytical framework established in *Truitt*." *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1065 (7th Cir. 1988). When the Board abandoned that doctrine anyway, the Seventh Circuit reiterated that it was certainly not incumbent on the Board to do so. *Graphic Communications Workers Local 508 v. NLRB*, 977 F.2d 1168, 1169 (7th Cir. 1992). Thus, *Nielsen* is arguably permissible under *Truitt*, but not compelled by it.

In her concurring opinion in *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1447–1450 (D.C. Cir. 1997), Judge Wald expressed her view that "there are sufficiently serious theoretical and practical fissures in the *Nielsen* reasoning itself" that the rule should be revisited. I find her views persuasive, particularly because *Nielsen* permits such inconsistencies, and because it often sanctions "hide-the-ball" conduct at the bargaining table contrary to the obligation to bargain in good faith as explicated by the Supreme Court in *Truitt*, supra. A better and more practical rule would place on employers "the obligation to supply the union, upon request, with financial information necessary to substantiate the employers' objectively verifiable . . . claims" concerning their financial condition. *ConAgra*, supra at 1448 (Wald, J., concurring). In the absence of a Board majority to revisit the *Nielsen* rule, however, I accept it as current Board law. And in any event, as I explain below, it is easily met in this case.

ees' demand rather than simple unwillingness to do so." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984). "[N]o magic words are required to express an inability to pay," so long as the employer's "words and conduct [are] specific enough to convey such a meaning." Id.

When McDonald telephoned Irvin on July 31, he reviewed with her the contents of Bryan's letter to employees. That letter categorically stated that the Respondent (a) was "unable to pay" the 2001 bonus "as a result of the poor economic climate," (b) regretted "having to" cancel the bonus, and (c) had "no choice" but to cancel the bonus "based on the business environment." Reasonably interpreting these statements by giving them their plain meaning, it is apparent that the Respondent claimed financial inability, not simple unwillingness, to pay the 2001 bonus.[6]

This finding gains force from the rest of Bryan's letter. Sounding a dismal note from the very outset, the letter declared that the Respondent was "in the midst of the worst advertising downturn in a decade," which was having a "devastating effect on the financial performance of all media companies." The letter asserted an "absence of new revenue possibilities," which was "driv[ing]" the Respondent "to look at the cost side of the business." The letter then informed employees that, in fact, the Respondent was not just *beginning* "to look at the cost side of the business," but on the contrary had been cutting costs in a variety of ways "for several months," only to find that these cuts would "not be enough to offset the projected decline in advertising revenues." See *Shell Co.*, supra, 313 NLRB at 133 (finding the employer claimed inability to pay where, inter alia, it referred to steps it had already taken to address its financial situation). Having thus set the stage, the letter then announced, in so many words, the Respondent's inability to pay the 2001 bonus. Viewing Bryan's letter as a whole, the Respondent's message was one of financial inability, not simple unwillingness.

Finding to the contrary, the majority agrees with the judge's characterization of Bryan's letter as claiming that the Respondent was "losing money." Nowhere in the letter does Bryan use those words. The judge and the majority also reason that Bryan's letter does not state that the Respondent has "insufficient assets" to pay the bonus. But that is not the proper analysis. As stated above, there are no magic words required for an inability-to-pay claim. In any event, the Respondent said it was "unable to pay" and therefore had "no choice" but to cancel the bonus. It is hard to imagine a more literal claim of insufficient assets, not to mention inability to pay.

In finding that the Respondent did not claim inability to pay, the majority principally relies on *AMF Trucking & Warehousing*, supra. Its reliance on *AMF* is unsound for two reasons.

First, unlike the Respondent, the employer in *AMF* never expressly stated that it was unable to pay. Thus, in *AMF* the Board had the task of interpreting the employer's statements to determine whether they *implied* an inability-to-pay claim. In that context, the *AMF* majority considered the meaning of the phrase "inability to pay," and concluded that "inability to pay is inextricably linked to nonsurvival in business." 342 NLRB No. 116, slip op. at 2. That conclusion was mistaken, as I explain below. Setting that aside, however, *AMF* stands for the proposition that where an employer has not *expressly* claimed inability to pay (employers rarely do), the Board will not find it has implied such a claim unless it has intimated the prospect of nonsurvival in business. Today's decision now extends *AMF* to hold that where an employer *expressly* claims inability to pay, the Board will not take it at its word unless it *also* declares that its survival is at stake.

Second, the majority's reliance on *AMF* is unsound because its "nonsurvival" rationale is itself flawed. From the premise that "'[i]nability to pay' means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated," the *AMF* majority jumped to the conclusion that "inability to pay is inextricably linked to nonsurvival in business." 342 NLRB No. 116, slip op. at 2. That conclusion simply does not follow. A company in financial trouble may believe that it will survive its present crisis, and yet nevertheless presently have insufficient assets to pay. Indeed, that was the case here. Bryan observed that "the revenue outlook for the rest of this year is bleak," but concluded his July 31 letter by predicting that the Respondent would "emerge from this difficult period" into a "very bright future." Nevertheless, because of *present* economic conditions,

[6] The majority observes that the Union, in its August 3 letter requesting financial information, referred to two phrases in Bryan's July 31 letter, neither of which were among the three phrases I rely on as showing that the Respondent claimed inability to pay. That signifies nothing. The purpose of the August 3 letter was to request financial information *because* the Respondent had claimed inability to pay, not to make the case that the Respondent had so claimed. Naturally, therefore, Irvin focused on financial assertions in Bryan's letter that she wanted the Respondent to document. Since Bryan had expressly said that the Respondent was "unable to pay," it would not have occurred to Irvin to think that she had to inform the Respondent *why* the Union was entitled to financial information.

Bryan declared the Respondent "unable to pay" a bonus for 2001.[7]

The majority cited no authority in *AMF*, and cites none here, for the proposition that a claim of *present* inability to pay, which is based on an employer's assertion that it *currently* does not have sufficient assets to meet the Union's demands, or will not have such assets during the term of a proposed collective-bargaining agreement, is not sufficient to trigger the employer's duty to furnish financial information to back up that claim. There is no reason in law or logic why an employer's duty to furnish such information should not be triggered in such a situation, even if the employer is not claiming that its very survival is at stake. By interpreting *Truitt* and *Nielsen* to require that showing, the majority continues to move the goalposts even further in these cases., Its approach frustrates good faith bargaining and seriously undercuts the *Truitt* principle.

B. The Respondent Did Not Retract Its Inability-To-Pay Claim

The judge and the majority find that even if Bryan's July 31 letter claimed inability to pay, the Respondent retracted that claim in its letter of August 8. The Respondent did nothing of the kind. Its August 8 letter simply rewrote history. Bryan's letter stated that "[a]s a result of poor economic climate, we are unable to pay" the bonus; the August 8 letter falsely claimed that the Respondent "has not indicated that it is unable to pay the bonuses from a financial standpoint." Bryan's letter stated that "we have no choice" but to cancel the bonus; the August 8 letter falsely claimed that the Respondent had indicated "that it has chosen not to pay." These transparently false assertions were not a retraction of Bryan's statements because "a retraction of a particular statement, by its very nature, implies an acknowledgment that the statement was made." *Lakeland Bus Lines*, supra, 335 NLRB at 326.

In finding a retraction of Bryan's inability-to-pay claim, the judge cited *Central Management Co.*, 314 NLRB 763 (1994). *Central Management* is distinguishable. In that case, the employer clarified its bargaining position by stating that "[t]he Company does not claim inability to pay," and the union's negotiator admitted that "it was 'obvious' to the [u]nion that the [r]espondent was no longer claiming poverty." 314 NLRB at 769 (emphasis omitted). The Board found that the employer had effectively withdrawn its earlier claim of inability to pay "[i]n light of the [u]nion's admission." Id. Here, by contrast, the Union never accepted the Respondent's August 8 denial as a withdrawal or retraction of its July 31 inability-to-pay claim. Moreover, in *Central Management*, the employer did not falsely assert—as did the employer in *Lakeland* and the Respondent here—that it had *never* claimed inability to pay. Rather, it made a present-tense statement that it "does" not so claim, which the Board accepted, in light of the union's admission, as a valid retraction of its earlier claim. Thus, *Central Management* is unavailing.[8]

To find a valid retraction, the majority relies on *American Polystyrene Corp.*, 341 NLRB No. 67 (2004). In *American Polystyrene*, the union negotiator, during bargaining, asked the employer's negotiator, Carolyn Tan, if Tan was saying she could not afford the union's proposals. Tan replied: "No, I can't. I'd go broke." At the end of the bargaining session, the union requested financial information substantiating Tan's claim. Tan denied the request the next day, stating that "at no time have I ever told you we cannot afford your proposals." 341 NLRB No. 67, slip op. at 1. A Board majority found that Tan had retracted her inability-to-pay claim. Id., slip op. at 2. In so finding, however, the Board did not reject its retraction analysis in *Lakeland Bus Lines*, supra. Rather, it distinguished *Lakeland* on two grounds. First, in *Lakeland*, the employer's claim of inability to pay "was made in a letter to unit employees at the end of negotiations," whereas Tan's inability-to-pay claim was made "orally, during the heat of a negotiating session, not reflectively in a letter." Id. Second, in *Lakeland*, the employer's pseudo-retraction came two weeks after the union's information request, whereas Tan's denial was made "immediately, within a day" of her inability-to-pay claim. Id. Whatever one thinks of these distinctions,[9] the present case is not similarly distinguishable from *Lakeland*. Here, as in *Lakeland*, the inability-to-pay claim was made reflectively in a letter to unit employees, and the subsequent denial of that claim was not immediate. Here, as in *Lakeland*, the inability-to-pay claim stands unretracted.[10]

[7] The majority is mistaken then in assertions that there were no "bleak predictions or pronouncements" in the letter.

[8] The majority says that I have not pointed to a meaningful distinction between the facts of this case and those of *Central Management*. However, the distinctions I draw above are exactly those relied upon by a three-member majority in *Lakeland Bus Lines* in finding no valid retraction of an inability-to-pay claim in that case. 335 NLRB at 326 fn. 14. *Lakeland Bus Lines* has not been overruled. Thus, with the majority's decision in this case, Board precedent holds that *Central Management* both is and is not distinguishable on the grounds I have relied on here.

[9] I find these distinctions unpersuasive. Tan did not retract her claim of inability to pay, she simply denied it. I agree with the views expressed by Member Walsh in his *American Polystyrene* dissent. See 341 NLRB No. 67, slip op. at 3-5.

[10] As I have just shown, the very grounds upon which the majority relied in *American Polystyrene* to distinguish *Lakeland* demonstrate

CONCLUSION

Even under the flawed *Nielsen* rule, the outcome of this case should not be in doubt. After all, this is the truly rare case in which the employer actually claims, in so many words, that it is "unable to pay" and has "no choice" other than not to pay. And yet, the majority finds that not even "unable to pay" *really means* "unable to pay." In so finding, the majority countenances double-talk that is the antithesis of good-faith bargaining. I dissent.

Dated, Washington, D.C. August 26, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Thomas P. McCarthy, Esq., for the General Counsel.
L. Michael Zinser, Esq., and *Michael A. Betts, Esq.*, of Nashville, Tennessee, for the Respondent-Employer.
Jay J. Levit, Esq., of Richmond, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on March 25 and 26, 2002, in Richmond, Virginia, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board) on October 31, 2001.[1] The complaint, based upon charges in Cases 5–CA–29803[2] and 5–CA–29907 filed by the Graphic Communications International Union, Local 40-N, AFL–CIO (the Charging Party or Union), alleges that Richmond Newspapers, Inc., Richmond Times-Dispatch, a Media General Inc. Company (the Respondent or Employer),[3] has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

The complaint alleges a violation of Section 8(a)(1) and (5) of the Act by Respondent's conduct in unilaterally discontinuing the practice of paying the Christmas or holiday bonus to its employees and by refusing to provide financial information to the Union requested by it to substantiate the Respondent's inability to pay the bonus.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the publication of the Richmond Times-Dispatch, a daily newspaper, with an office and place of business located in Richmond, Virginia, where it annually derives gross revenues in excess of $200,000 and has purchased and received products, goods and materials, valued in excess of $5000 directly from points located outside the State of Virginia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union represents all pressroom employees at the Respondent and has been the designated exclusive collective-bargaining representative of the unit at all material times. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from January 4, through February 1, 2004.

At all material times J. Stewart Bryan, III, held the position of chairman and chief executive officer of Respondent, Frank A. McDonald, Jr. serves as vice president of human resources, Karen Larson is director of human resources, and Joel Cox holds the position of production administrator. The primary official of the Union is President Valerie Irvin.

B. The 8(a)(1) and (5) Violations

1. Facts

The General Counsel alleges in paragraph 13 of the complaint that on or about July 31, Respondent unilaterally discontinued the practice of paying the Christmas or holiday bonus to employees in the Charging Party's bargaining unit. The General Counsel further alleges in paragraphs 9 and 10 of the complaint that the Union requested certain financial information to verify the Respondent's position that it was unable to pay a Christmas or holiday bonus in 2001, but Respondent refused to provide such information.

The Respondent stipulated that it has paid a Christmas or holiday bonus to employees represented by the Union from

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that *Lakeland* is indistinguishable from this case. My colleagues do not dispute this. They believe, of course, that it was *Lakeland* that was wrongly decided: they found it "unnecessary to pass on the validity" of *Lakeland* in *AMF*, and they reiterate that point here. The fact remains, however, that *Lakeland Bus Lines* remains good law; and based on the rationale of *American Polystyrene* itself, *Lakeland* is directly on point. Because *Lakeland* cannot be distinguished, it must be followed absent its being overruled. See, e.g., *Daimler Chrysler Corp.*, 344 NLRB No. 94, slip op. at 1 fn. 1 (2005); *Williams Energy Services*, 340 NLRB No. 87, slip op. at 2 fn. 6 (2003).

[1] All dates are in 2001 unless otherwise indicated.

[2] On the first day of the hearing, after opening the record, Respondent and the Union entered into an all-party informal Board settlement with the posting of a notice (ALJ Exh. 1). The agreement was submitted to me for approval under Sec. 101.9(3)(d)(1) of the Board's Rules and Regulations. I approved the settlement agreement and also approved the General Counsel's motion to sever Case 5–CA–29803 from the consolidated complaint and notice of hearing. Thus, the subject decision only involves Case 5–CA–29907.

[3] The true and correct name of the Respondent appears in the caption as amended at the hearing.

1960 through 2000. However, the Respondent concedes that it did not pay a Christmas or holiday bonus to employees represented by the Union in December 2001. The record confirms that the Christmas or holiday bonus is normally paid in the second week of December, and Federal, State, and social security taxes are withheld from each employee's check. The bonus is the equivalent of 1 week's pay and increases proportionately with employee increases in salary. The Christmas or holiday bonus is a budgeted item and is reported on the employee's W-2 form for income tax purposes. Thus, I conclude that the Christmas or holiday bonus relates to wages, hours, and other terms and conditions of employment for employees in the Charging Party's collective-bargaining unit and is a mandatory subject for the purposes of collective bargaining. *Radio Electric Service Co.*, 78 NLRB 531 (1986).

On July 31, McDonald along with Larsen notified Union President Irvin by a telephone conference call that the 2001 Christmas or holiday bonus would not be paid to members of the Union's bargaining unit because of poor economic conditions.[4] Additionally, McDonald apprised Irvin that restrictions on earning overtime pay, travel, and hiring would be imposed during the remainder of 2001. During the telephone conversation, McDonald acknowledged that the cancellation of the bonus was a bargainable issue and the Respondent was willing to meet and negotiate. Irvin said, "we will get back to you after checking with the membership." Bryan, in a letter that was sent to all employees on July 31, explained that due to "the worst advertising downturn in a decade, the Employer would be unable to pay a Christmas or Holiday bonus this year" (GC Exh. 3).[5] On August 3, the Union responded to Bryan's letter agreeing that the Christmas bonus was a bargainable matter and indicating a willingness to meet with the Respondent on this issue (GC Exh. 4). In that letter, the Union requested that before such a meeting took place, it was necessary to obtain specific financial information from Respondent. Such information requested included books and records so it could determine whether there is a "cash flow" problem and to verify that the newspaper is "weak" when it comes to revenues. The Union reiterated that after it examines the information, it would meet with the Respondent to engage in meaningful discussions over the elimination of the Christmas or holiday bonus.

By letter dated August 8, Respondent replied to the Union's request for information (GC Exh. 5). The Respondent stated that since the Union relied on statements in the Bryan July 31 letter and assumed that the Employer was unable to pay the Christmas or holiday bonus, the Respondent was officially retracting that statement. The Respondent informed the Union that it is not unable to pay the bonuses from a financial standpoint but rather that it has chosen not to pay at this time due to the economic situation in the marketplace. While the Respondent informed the Union that it had no legal obligation to provide the requested information, it reiterated its willingness to bargain over the elimination of the Christmas or holiday bonus. The Respondent, while not providing any financial books or records responsive to the information request, did give the Union copies of the 1998, 1999, and 2000 annual reports and 10-K reports provided to the Securities and Exchange Commission on or about September 24.

By letter dated October 5, to all employees including those represented by the Union, Bryan confirmed that the Christmas or holiday bonus would not be paid this year nor in future years (GC Exh. 6). Bryan indicated, however, that employees who have been receiving the bonus would have their value added to their paychecks throughout calendar year 2002. He invited those employees covered by union contracts to participate in this proposal. On the same date, McDonald and Larsen participated in a second conference call with Irvin. The parties discussed the substance of the October 5 letter, with McDonald acknowledging it was a negotiable item. Irvin apprised McDonald that she would get back to him after checking with the membership.

On December 21, McDonald along with Cox participated in a third telephone conference call with Irvin. McDonald raised the issue that members of the unit could have the value of the Christmas bonus added to their paychecks throughout the cal-

[4] The Christmas of holiday bonus cancellation for 2001 applied to all union and nonunion employees of Respondent.

[5] The July 31 letter states in pertinent part:

> As we all well know, we are in the midst of the worst advertising downturn in a decade, caused by a weak economy. This is having a devastating effect on the financial performance of all media companies. In response to weak business conditions, the companies in our industry are implementing aggressive cost-cutting measures in order to maintain cash flow during this difficult time. Many have had significant employee layoffs.
>
> Thus far, this has not been the case at Media General, and we hope to continue to avoid a major layoff. We must, however, find other ways to reduce costs further.
>
> Unfortunately, the revenue outlook for the rest of this year is bleak. Opinion in our industry is divided on whether the advertising downturn is at bottom, but there certainly is no evidence of an upturn. Our company faces a very difficult second half of the year. The broadcast division will not have the revenues it had last year from political campaigns and the Olympics, and our newspaper side is also weak. In the absence of new revenue possibilities, we are driven to look at the cost side of the business to improve overall performance.
>
> We have already instituted strict hiring constraints and reduced overtime. We have restricted travel and entertainment and the use of outside consultants. We have eliminated many marketing and promotion expenditures. Capital expenditures have been restricted to those that produce quick positive cash impact.
>
> Many of the initiatives focused on the cost side of the business have been in place for several months. These initiatives have been helpful in addressing the business requirement to maintain a strong cash flow. However, as we look to the remaining part of the year we find that our current initiatives will not be enough to offset the projected decline in advertising revenues. As a result of the poor economic climate, we are unable to pay a Christmas or Holiday bonus this year to employees who may have been eligible for one. We will also implement a new Voluntary Unpaid Leave Policy for non-represented employees, and your Human Resources Department will announce the details shortly.
>
> Our entire management team very much regrets having to take these actions, but we have no choice based on the business environment. While this may appear drastic within the culture of our company, it is far less severe than measures already taken by many of our peer companies.

endar year and offered to negotiate the matter with the Union. McDonald apprised Irvin that two other unions at Respondent representing the paperhandling employees and the drivers reached agreement to resolve the Christmas bonus issue. Irvin informed McDonald that the Union would get back to him.[6]

2. Analysis

It is well settled that an employer must disclose financial information only when the employer has indicated an inability to pay. In determining whether an employer is claiming an inability to pay, the Board and the US Courts of Appeals distinguish an employer's claim that it "can not pay" from an employer's claims that it "will not pay." When an employer states that it can not pay, it must furnish information to substantiate the claim, if asked to do so by the union. Where an employer states that it will not pay, the union must take other avenues to gather the information.

The Board has held that information about the financial condition of the employer is not presumptively relevant. *Nielsen Lithographing*, 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992). As stated in *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997):

> Although the relevance of information concerning the terms and conditions of employment is presumed, see *Ohio Power Co.*, 216 NLRB 987 (1975), no such presumption applies to an employer's information regarding its financial structure and condition, and a union must demonstrate that any requested financial information Is relevant to the negotiations in order to require the employer to turn it over. See *International Woodworkers v. NLRB*, 263 F. 2d 483, 485 (D.C. Cir. 1959).

In order to meet its burden of proving relevance, the union must establish that the employer has claimed that it is financially unable to pay the amounts proposed by the union in negotiations. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956).

In *Nielsen Lithographing*, the Board defined the "inability to pay," which triggers the employer's obligation to provide requested financial information. The Board said:

> [A] n employer's obligation to open its books does not arise unless the employer has predicated its bargaining stance on assertions about its inability to pay during the term of the bargaining agreement under negotiation. [Footnote omitted.]
>
> . . . .
>
> By contrast, the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay.

305 NLRB at 700.

In enforcing the Board's *Nielsen* decision, the Seventh Circuit elaborated on the term "inability to pay." The court noted that Nielsen sought concessions in bargaining to reduce its labor costs. However, the court said that:

> [Nielsen] did not base the demand on any claim that it was in financial jeopardy, strapped for cash, broke or about to go broke, unprofitable, or otherwise unable to pay the existing level of wages and fringe benefits . . .
>
> . . . .
>
> If the employer claims that it cannot afford to pay a higher wage or, as here, the existing wage, the union is entitled to demand substantiation in the employer's financial records . . . But there isn't a hint of that here . . . All that Nielsen was claiming was that if it didn't do anything about its labor costs it would continue to lose business and lay off workers. It didn't claim that it was in any financial trouble.

In subsequent cases, the Board and courts have made clear that only when a present inability to pay has been asserted will the union be entitled to requested financial information from the employer. For example, in *Shell Co.*, 313 NLRB 133 (1993), the Board found that an employer's claims that conditions were "very bad [ ]," "critical," a "matter of survival," and that "we need your help, your assistance, because of this condition," were tantamount to a claim of present inability to pay, and triggered the obligation to provide requested financial information. Conversely, where the employer merely states that it is "having trouble staying afloat," the "well has run dry," or claims only general economic difficulties or business losses" as the reason for its position, the employer may lawfully refuse to hand over financial information." *Nielsen*, 305 NLRB at 700, supra. Nor will an employer be required to open its books to the union on the basis of the employer's contentions that "its financial condition is bleak, or that it is suffering losses, or encountering economic difficulties." *Wisconsin Steel Industries*, 318 NLRB 212, 224 (1995).

When determining whether an employer is claiming a present inability to pay in bargaining, the Board looks not at isolated words, but at the record as a whole. Finally, even where an employer initially claims an inability to pay, if it subsequently makes clear that it is neither claiming poverty nor a present inability to pay, the Board will not require the employer to open its books to the union. See, *Central Management Co.*, 314 NLRB 763, 768-769 (1994).

In the subject case, the Union bases its argument that the Respondent is obligated to provide financial data on a portion of the Bryan July 31 letter. In this regard, the Union's focus is on the statement, "As a result of the poor economic climate, we are unable to pay a Christmas or Holiday bonus this year to employees who may have been eligible for one."

While there is no question that the words "unable to pay" are contained in the letter, it must be considered together and in context. In examining the July 31 letter in its totality, it specifically points out that the weak economy is having a devastating effect on the financial performance of all media companies and those employers are implementing aggressive cost-cutting measures to maintain cash flow during this difficult time. Re-

[6] By letter dated January 4, 2002, to union member Curtis Rickard, President and General Manager Albert T. August, III, confirmed that the Respondent had discussed the issue of adding the value of the Christmas bonus to employee's paychecks with Irvin. The letter further stated, "to date, however, the Union has not contacted the Respondent to discuss the matter" (GC Exh. 7). The Union responded to August by a letter dated January 8, 2002 (GC Exh. 8). August replied on January 10, 2002 (GC Exh. 9).

spondent notes that while competitors have been forced to lay off employees, this has not been the case here and it hopes to avoid a major layoff. In order to avoid such layoffs, it states it must find other ways to reduce costs further. The Respondent, in order to reduce costs, informed all employees including those represented by the Union that it must improve overall performance and it has already instituted strict hiring constraints, reduced overtime, restricted travel and entertainment, and the use of outside consultants.

Based on my evaluation of the July 31 letter in its entirety, I find that its content reflects and conveys to employees that the Respondent was losing money. However, there is a clear distinction between "losing money" and "an inability to pay." An employer can be losing money and yet have sufficient assets to weather the storm. In the subject case, the Respondent may well have been "losing money," but it never claimed that it had insufficient assets to meet the Union's[7] demands for the payment of the Christmas or holiday bonus.

Under these circumstances, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to provide the requested information.

Even assuming, arguendo, that certain conduct by the Respondent could be construed as an implicit claim of "inability to pay," the Respondent subsequently made it clear, in its August 8 letter to the Union, that it had not been and was not asserting such a claim. Thus, the Respondent expressly stated that "Media General has not indicated that it is unable to pay the bonuses from a financial standpoint but rather that it has chosen not to pay at this time due to the economic situation in the marketplace. Because the revenue outlook for the rest of the year is bleak, Media General has chosen as a discretionary matter to introduce some institutional belt-tightening."

Based on the forgoing, I find that this represents an additional reason that the Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to provide the requested information.

In regard to the General Counsel's additional assertion that the Respondent violated Section 8(a)(1) and (5) when it unilaterally discontinued the practice of paying the Christmas or holiday bonus, I find that the Respondent did not violate the Act for the following reasons.

The Union admits that McDonald during their telephone conversation on July 31, agreed that the discontinuance of the Christmas bonus was a negotiable issue and Respondent wanted to meet with the Union. By letter dated August 3, and admitted by Irvin, the Union agreed to meet but conditioned the meeting on the receipt of specific financial information. The Union stated, "After our examination, we will then be able to meet with you so that we can have meaningful discussions of these financial matters and their impact, if any" (GC Exh. 4).

Because the Union conditioned any meeting to discuss the discontinuance of the Christmas bonus on the receipt of information, no separate negotiation sessions took place between the parties on this issue. Likewise, the Union never responded to the Respondent's offer to negotiate over the proposal to add to employee's paychecks the value of the Christmas bonus as two other unions at Respondent had done.

Since the Union sat on its rights and conditioned bargaining on the receipt of financial information that I have determined was not necessary to provide to the Union, I find that the Respondent did not violate the Act. Therefore, when the Respondent discontinued the practice of paying the Christmas or holiday bonus in December 2001, and the Union did not engage in negotiations after Respondent's prior notification and willingness to negotiate, Section 8(a)(1) and (5) of the Act has not been violated. See *Haddon Craftsmen*, 300 NLRB 789, 790 (1990).

Based on the forgoing, I recommend that paragraphs 9, 10, and 13 of the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 4, 2002

[7] In this regard, the Union knew or should have known that Respondent was not pleading poverty nor was it on the verge of filing bankruptcy. Indeed, the Union was provided the 1998, 1999, and 2000 annual and 10-K reports on or about September 24 that shows that the Respondent had sufficient assets to pay the Christmas or holiday bonus. Likewise, the Union, as a stockholder along with its individual employee members, was aware that the Respondent on July 26 declared a quarterly dividend of 17 cents per share payable on September 15 (R Exh. 5).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.